

ARKANSAS SUPREME COURT

No. CR 08-1392

WILBERT L. JOHNSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 12, 2009

PRO SE MOTIONS AND AMENDED
MOTIONS TO COMPEL AND FOR
COPY OF RECORD AND EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [CIRCUIT COURT OF
PULASKI COUNTY, CR 2006-3233,
HON. BARRY A. SIMS, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

A judgment entered on April 29, 2008, reflects that appellant Wilbert L. Johnson entered negotiated pleas of guilty to theft by receiving, fleeing, and violation of the Omnibus DWI Act. On May 23, 2008, appellant filed in the trial court a timely but unverified petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. On July 22, 2008, appellant filed a motion to amend the Rule 37.1 petition and filed an amended Rule 37.1 petition the next day that included a verification. The motion and amended petition were filed within the ninety-day period provided in Arkansas Rule of Criminal Procedure 37.2(c) for filing a Rule 37.1 petition where the conviction was on a plea of guilty. On September 15, 2008, the trial court entered an order that granted leave to amend the petition and a separate order that denied the amended petition. Appellant has lodged in this court an appeal of the order denying relief and has now filed a motion to compel in which he seeks copies of the transcript and plea agreement and a motion seeking a copy of the record and an

extension of time in which to file appellant's brief. Appellant has filed additional amended motions seeking additional documents.

Because it is clear that appellant cannot prevail, we dismiss the appeal as to appellant's Rule 37.1 petition, and the motions are moot. An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam).

In its order, the trial court provided rulings as to two claims of ineffective assistance of counsel.¹ The trial court found that appellant had not met his burden of proof as to allegations that trial counsel was ineffective because he forced appellant to enter a plea through threats and because he did not take into account appellant's mental health history. The trial court found that the claims were not substantiated with factual allegations and were presented with only conclusory allegations.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006) (per curiam). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

When a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to a Rule 37.1 petition are those which allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998). Appellant must have shown in his petition that there was a reasonable probability that, but

¹ An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. See *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). We therefore need only address those issues upon which the trial court provided a ruling.

for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 251, 964 S.W.2d at 397; *see also Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). The burden is on appellant to provide facts to support his claims of prejudice. *Bumgardner v. State*, ___ Ark. ___, ___ S.W.3d ___ (Sept. 18, 2008) (per curiam). Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam); *see also State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

Here, the trial court did not err in finding that the claims as presented in appellant's petition were limited to conclusory allegations. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

Appellant averred in the petition that counsel had coerced him into entering his plea, but the purported threats and actions by counsel as described in the petition did not rise to the level of coercion. The only specific threats identified by the petition as made by trial counsel were claims that counsel told appellant he would be "railroaded" if he went to trial and did not accept the plea. Advising appellant of a potentially unfavorable outcome at trial does not rise to the level of coercion.

Appellant asserted that counsel should have contested issues concerning competency but did not provide facts sufficient to support any finding that appellant would have been prejudiced by that alleged failure. A petitioner who asserts his incompetence for the first time in a petition for postconviction relief has the heavy burden of demonstrating with facts that he was not competent at the time of trial. *Matthews v. State*, 332 Ark. 661, 966 S.W.2d 888 (1998) (per curiam). Even though a petitioner can document a history of mental illness or show that counsel could have argued incompetence, that showing, without more, is not sufficient to support postconviction relief. *See*

Henry v. State, 288 Ark. 592, 708 S.W.2d 88 (1986). Here, appellant only provided vague allegations of a “psychiatric history” without any specific diagnosis or references and alluded to being under the influence of “psychotropic medication” and sedated. He did not identify either specific drugs or how he was impaired. He failed to include more than mere conclusory allegations in the petition.

Because the trial court correctly determined that the petition did not include facts sufficient to support postconviction relief, appellant cannot prevail on appeal. Accordingly, we dismiss the appeal, and the motions are moot.

Appeal dismissed; motions moot.